

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE WOODS,

Defendant-Appellant.

UNPUBLISHED

May 19, 1998

No. 200616

Recorder's Court

LC No. 96-500576

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to sixteen years' imprisonment. We affirm.

I

Defendant first argues that his in-court identification was tainted. Specifically, defendant argues that Dye, the witness that identified him, was only able to do so at the preliminary examination and at trial because she saw defendant sitting at the defense table, and defense counsel stated that he would be representing defendant.

Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). After a careful review of the record, we are convinced that no manifest injustice resulted from Dye's in-court identification of defendant. Although Dye was young at the time of this incident, she was able to view defendant from a distance of fifteen feet during the assault. Dye never wavered in her identification of defendant, and stated both at the preliminary examination and at trial that she had no doubt that defendant was the person that committed the assault.

II

Defendant next argues that there was insufficient evidence to convict defendant of assault with intent to do great bodily harm less than murder. We disagree.

When presented with a challenge to the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997).

In the present case, sufficient evidence existed to convict defendant of assault with intent to do great bodily harm less than murder. The testimony at trial established that defendant and another person knocked the victim to the ground, and then kicked him while he was on the ground. As soon as the victim stood up, defendant hit him in the face with a glass wine bottle at least twice. Defendant was the only person with a glass bottle in his hands. As a result of this attack, the victim suffered a severe brain injury, underwent a left temporal lobectomy, and remains in a convalescent home. Viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

III

Defendant's final issue on appeal is that the prosecutor's comments during rebuttal impermissibly shifted the burden of proof from the prosecution to defendant. Because defendant did not object to the prosecutor's remarks now challenged on appeal, appellate review is foreclosed except where a curative instruction could not have eliminated the prejudicial effect of the alleged misconduct or where failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

This Court does not review a prosecutor's remarks in a vacuum; rather, they are read in context. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). This scope of review on appeal is important because an otherwise improper remark may not require reversal when the prosecutor is responding to the defense counsel's argument. *Id.*

In the present case, the remarks made by the prosecutor during rebuttal were not improper. During closing arguments, defense counsel argued that the police did not conduct a proper investigation because they failed to locate and interview potential witnesses. On rebuttal, the prosecutor commented that defendant had the same information regarding other potential witnesses and that defendant could have found these people and had them testify if he felt that they would have aided his defense. No prejudice resulted from these remarks, which were made in response to defense counsel's argument. Our refusal to review this issue further will not result in a miscarriage of justice.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.